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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 David Brooks Allen,
13 Defendant.
14

No. CR-11-00989-002-PHX-DJH
ORDER

15 Pending before the Court is Defendant David Brooks Allen's ("Defendant") Motion
16 to Enforce Settlement/Payment Agreement, or in the alternative, his Motion to Quash the
17 Government's Restitution Lien on 3759 S. Dew Drop Lane in Gilbert, Arizona. (Doc. 210
18 at 1). Plaintiff United States of America (the "Government") filed a Response in
19 Opposition (Doc. 212). Defendant filed a Reply (Doc. 211). The Court held a hearing on
20 October 20, 2022, and took the matter under advisement. (Doc. 224).

21 **I. Background**

22 On January 3, 2012, the Court sentenced Defendant to 37 months in prison
23 following Defendant's guilty plea of conspiracy and bank fraud. (Doc. 108 at 1).
24 According to Defendant's Judgment:

25 The defendant shall pay a total of \$1,151,595.26 in criminal monetary
26 penalties, due immediately. Having assessed the defendant's ability to pay,
27 payment of the total criminal monetary penalties are due as follows: Balance
28 is due in equal monthly installments of \$500.00 over a period of 58 months
to commence 60 days after the release from imprisonment to a term of
supervised release. The Court finds the defendant does not have the ability

1 to pay a fine and orders the fine waived.

2 (*Id.*)

3 Upon release, Defendant did not have the ability to pay the \$500.00 monthly
4 installments and the Court reduced his monthly payment to \$100.00. (Doc. 133). On
5 December 13, 2019, this Court revoked Defendant's supervised release and ordered
6 Defendant to pay \$400.00 a month. (Doc. 177). Defendant's restitution payment has not
7 been modified since the Court's 2019 order. (Doc. 210 at 2).

8 **A. Defendant's Dew Drop Property and Settlement Agreement**

9 On October 15, 2020, Defendant purchased the Dew Drop property at issue here.
10 (Doc. 212-1 at 284). On November 19, 2020, the Government recorded a nominee lien
11 on the Dew Drop property under 18 U.S.C. § 3613(c). (Doc. 196-2 at 2–4).

12 In September of 2021, Defendant's counsel contacted the Government and
13 requested "some sort of settlement" so Defendant could refinance the Dew Drop property.
14 (Doc. 212 at 8). The Government represents that, during this discussion, Defendant's
15 counsel provided information that differed from Defendant's previous financial statement.
16 The Government thus requested another financial statement and a copy of the loan file.
17 (*Id.*) The Government then informed Defendant's counsel that any settlement agreement
18 needed to include a subordination, rather than a release, of its lien as early as March of
19 2022. (*Id.* at 9).

20 The parties ultimately entered into a settlement agreement on May 16, 2022. (Doc.
21 196-1 at ¶ 17). In relevant part, the agreement sets forth the following provisions: (1)
22 Defendant would complete the refinance of the Dew Drop property in the amount of
23 \$548,250; (2) once the loan closed and the original lender and closing costs were paid,
24 the remaining proceeds minus \$20,000 (at least \$97,427) would be deposited with the
25 Clerk of the Court to be applied toward Defendant's restitution judgment; (3) once the
26 Government confirmed that the Clerk received the funds and the other conditions were
27 met, it would execute an agreement subordinating its lien to the lender, Amerifirst
28 Financial. (Doc. 212 at 10).

1 On May 25, 2022, Defendant's counsel informed the Government that the
 2 underwriter would not accept a subordination. (*Id.*) The Government then learned that
 3 Amerifirst Financial is unable to lend under the circumstances here because the lender is
 4 not a portfolio lender and instead sells its mortgages on the secondary market. (*Id.*) The
 5 Government further represents that Amerifirst would be unable to lend to Defendant even
 6 if the Government temporarily released its lien. (*Id.*)

7 On September 28, 2022, Defendant filed his Motion, requesting this Court to
 8 enforce the parties' settlement agreement and limit the Government's collection
 9 proceedings because of its unreasonable conduct, or in the alternative, to quash the
 10 Government's Restitution Lien on 3759 S. Dew Drop Lane in Gilbert, Arizona. (Doc.
 11 210 at 5).

12 **II. Discussion**

13 Defendant asks this Court to enforce the parties' settlement agreement so that the
 14 loan will close or, in the alternative, to quash the restitution lien because the property does
 15 not belong to Defendant. (Doc. 210 at 17). The Government contends the problem here
 16 is "not with the Government but rather with the lender" and that the Court "cannot force
 17 the lender, neither a party to the agreement nor this case, to close on the loan." (Doc. 212
 18 at 12). The Government further asserts that although Defendant asks the Court to quash
 19 its lien under the Federal Debt Collection Procedure Act ("FDCPA"), the FDCPA only
 20 cover liens which arise from civil actions and here the lien arose from a criminal case. (*Id.*)
 21 Because this is not an enforcement action under the FDCPA, the Government says
 22 Defendant has failed to provide a legal basis for his requested relief and therefore the
 23 Motion should be denied. (Doc. 212 at 14).

24 **A. Criminal Restitution and Judgment Lien**

25 The Mandatory Victims Restitution Act ("MVRA") "requires a criminal defendant
 26 convicted of certain crimes, including those 'committed by fraud or deceit,' to pay
 27 restitution to the victims of his or her offense in an amount equal to the value of any
 28 property damaged or lost in the offense." 18 U.S.C. § 3663A. The MVRA seeks to

1 “recognize the impact that crime has on the victim, and, to the extent possible, ensure that
 2 [the] offender be held accountable to repay these costs.” *United States v. Novak*, 476 F.3d
 3 1041, 1043 (9th Cir. 2007) (quoting S. Rep. No. 104-179, at 18 (1995)). To ensure that
 4 accountability, the MVRA’s enforcement provision “consolidated and strengthened the
 5 procedures available to the government for collecting unpaid restitution.” 18 U.S.C. §
 6 3613(a); *United States v. Swenson*, 971 F.3d 977, 982 (9th Cir. 2020) (citing *In re Partida*,
 7 862 F.3d 909, 913 (9th Cir. 2017)). The provision provides:

8 The United States may enforce a judgment imposing a fine in accordance
 9 with the practices and procedures for the enforcement of a civil judgment
 10 under Federal law or State law. Notwithstanding any other Federal law[,] . .
 11 . a judgment imposing a fine may be enforced against all property or rights
 to property of the person fined[.]

12 § 3613(a); *see Swenson*, 971 F.3d at 983 (“We have recognized from the breadth of the
 13 statute’s text Congress’s intent to broaden the government’s collection powers to reach all
 14 of a defendant’s assets.”).

15 The MVRA provides that a criminal judgment ordering restitution may be enforced
 16 “in accordance with the practices and procedures for the enforcement of a civil judgment
 17 under Federal law or State law.” 18 U.S.C. §§ 3613(a) and (f); *see also United States v.*
 18 *Berger*, 574 F.3d 1202, 1204 (9th Cir. 2009). The FDCPA provides procedures for
 19 recovery of an outstanding judgment, such as an amount owed for restitution. 28 U.S.C.
 20 §§ 3001-3002; *United States v. Gianelli*, 543 F.3d 1178, 1182 (9th Cir. 2008), *cert. denied*,
 21 555 U.S. 1175 (2009). The FDCPA includes a judgment lien under 28 U.S.C. § 3201.
 22 Where, as here, the restitution lien arose from a criminal judgment, it remains civil in
 23 nature. *See United States v. Clark*, 2014 WL 12856116, at *1 (D. Ariz. May 8, 2014)
 24 (“[A]lthough a garnishment action may arise out of a criminal judgment, as is the case here,
 25 it is civil in nature.”).

26 **B. Settlement Agreement**

27 During oral argument, Defendant’s counsel clarified that the relief Defendant seeks
 28 is that the Government allow him to sell the property. Defendant’s counsel also recognized

1 that because of the time gap and the increased interest rates, this is not necessarily an option
 2 anymore. Regardless, the Government represents that Amerifirst would be unable to lend
 3 to Defendant even if the Government temporarily released its lien. (Doc. 212 at 11).
 4 Because of Defendant's admission that the circumstances have changed, coupled with the
 5 Government's representations that Amerifirst would be unable to lend regardless of
 6 whether the Government released the lien, the Court finds enforcement of the settlement
 7 agreement to be moot.


8 **C. Defendant's Motion to Quash the Government's Lien**

9 In the alternative, Defendant asks this Court to quash the Government's lien.
 10 Defendant cites no authority, however, and the Court is aware of none, that permits this
 11 Court to do so. The Court also questions whether Defendant's request to quash the lien is
 12 appropriate here. Two statutes control this matter—the MVRA and the FDCPA. Under
 13 the FDCPA, Defendant may file a motion to quash a writ of garnishment. 28 U.S.C. §
 14 3205(c)(10). The garnishment may be quashed by (1) court order, (2) exhaustion of the
 15 property that is the subject of the garnishment, or (3) satisfaction of the debt. *Id.* Defendant
 16 has not presented a similar legal basis for quashing the judgment lien under 28 U.S.C. §
 17 3201. Finding none, the Court finds Defendant has not met his burden to quash the lien
 18 and the Motion will be denied. *See United States v. Taylor*, 2018 WL 10016087, at *1 (D.
 19 Ariz. May 14, 2018) (“The party that moves to quash . . . has the burden of persuasion.”).

20 Accordingly,

21 **IT IS HEREBY ORDERED** that Defendant's Motion to Enforce
 22 Settlement/Payment Agreement, or in the alternative, his Motion to Quash the
 23 Government's Restitution Lien on 3759 S. Dew Drop Lane in Gilbert, Arizona (Doc. 210)
 24 is **denied**.

25 Dated this 18th day of November, 2022.

26 
 27 Honorable Diane J. Humetewa
 28 United States District Judge